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JEFFREY D. COLMAN

July 23, 1997

BY FACSIMILE: 202-208-3333

Marjorie Emmons
Commission Secretary
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Proposed Advisory Opinion 1997-12

Dear Ms. Emmons:

We are counsel to Congressman Jerry Costello and his political campaign committee. I write to request that the Commission amend its proposed Advisory Opinion 1997-12 (hereafter "draft") in three principal regards prior to issuing the Advisory Opinion in its final form.

1. Congressman Costello's Statement of Candidacy for 1998

On page one (footnote one) of the draft it is stated that the Commission's records "do not indicate that Mr. Costello has filed a Statement of Candidacy (FEC Form 2) for the 1998 election cycle at this time." The Commission's records should reflect the filing of the Statement of Candidacy for 1998. Congressman Costello's Statement of Candidacy for 1998 was sent to the FEC by Federal Express on January 23, 1997, and he has a receipt dated January 24, 1997 showing that the FEC received the statement on that date.

2. The nature of legal services performed for Congressman Costello

We ask that the FEC reconsider the position taken on pages 8-9 of the draft that items 3, 6 and 7 are personal in nature and may not be paid from campaign funds. We believe there are two fundamental errors in the draft relating to this issue.

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OFFICE OF THE SECRETARY

First, after correctly summarizing the allegations reported in the media, the draft concludes that the legal services in question "are not related to any campaign activity by Mr. Costello nor to his duties as a federal officeholder." (Draft at 9). This is incorrect. The allegations reported in the media -- to which Congressman Costello responded -- related specifically to his status as a congressman and a Democratic Party officeholder. (See Draft at 4). We cannot emphasize enough Congressman Costello's position that the substantive allegations in question are false. Nonetheless, among other matters, the allegations related to what role, if any, he played in the passage of H.R.878, and whether he had a financial interest in the passage of that legislation. Contrary to the allegations reported in the media, Congressman Costello denies that he "lobbied hard" for that legislation or that he had any financial interest in the matter.

In order to properly respond to these unfounded allegations, it was necessary for counsel to properly investigate the factual allegations. This investigation included reviewing documents and interviewing witnesses. The draft states that it is appropriate for campaign funds to be utilized for legal services relating to responses to the allegations reported in the media; in order to properly respond, factual investigation was necessary. We believe that the draft misapprehends the situation by concluding that because a court could have ordered Congressman Costello to testify about these matters, the legal services did not relate to the Congressman's duties as an officeholder. (Draft at 9). We also believe that, if the draft is accepted, it will set an inappropriate precedent. There are numerous instances, including this one, in which a federal officeholder will be asked to be a witness in an ongoing proceeding where individuals, other than the officeholder, have made the official function of the officeholder an issue in the proceeding. The fact that an elected official is a witness or potential witness does not tell us whether or not the substantive issues or legal services relate to issues in a campaign or an officeholder's responsibilities.


Second, it is incorrect to state in the draft (at 9): "Mr. Costello's interest in averting indictment and prosecution in the described circumstances is obviously personal, and the legal counsel he obtained was as much, if not more, directed to avoiding personal adversity as it was to minimizing any negative impact on his 1996 and 1998 campaigns for re-election." As we stated in our request for the Advisory Opinion, Mr. Costello has never been identified to us as a subject or target of any investigation. At the time he voluntarily appeared before the grand jury, we were advised that the United States Attorney's Office viewed Mr. Costello as a witness. Any time someone makes negative statements about an individual, there is obviously a risk of personal adversity. That notwithstanding, in this instance Congressman Costello wants the FEC to understand his position is that he retained counsel not out of any desire to avert indictment or prosecution (because neither were threatened), but rather because he believed unfounded allegations were being made against him which had the potential for creating a negative impact on his reputation and his campaign for re-election. We respectfully submit that the statement made at page 9 in the draft is incorrect, unsupportable and should be deleted.

3. Research relating to the Speech and Debate Clause

The draft letter correctly notes that in preparing for Mr. Costello's grand jury appearance, and thereafter, we conducted legal research relating to "issues (including those arising under the U.S. Constitution) that could arise in connection with his testimony." (Draft at 8-9). As we stated in our letter requesting the Advisory Opinion, the legal research in issue related specifically to the Speech and Debate Clause of the United States Constitution. The draft concludes that these legal services "are not related to any campaign activity by Mr. Costello nor to his duties as a federal officeholder." (Draft at 9.) We believe this conclusion is erroneous. The research we conducted into issues relating to the Speech and Debate Clause was necessary solely because of Mr. Costello's status as a congressman. Were he a private citizen, we would not have had to do this research. The Congressman wanted to testify voluntarily before the grand jury, and we needed to determine whether the Speech and Debate Clause impacted on that decision. We understand that the FEC treats these matters on a case-by-case basis, but we believe that if the FEC adheres to the conclusion in the draft, it will set an inappropriate precedent. Research on issues like the applicability of the Speech and Debate Clause relates exclusively to an individual's status as an officeholder, and we respectfully submit that the FEC should conclude that such research may be paid for out of campaign funds.

Thank you very much for your attention to these matters.

Sincerely,


Jeffrey D. Goldman

JDC/sl

cc: Larry Noble (via facsimile)
N. Bradley Litchfield (via facsimile)
Anton R. Valukas
Congressman Jerry Costello

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